Supreme Court, U.S.
FILED
JUL 10 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1980

No. 80-40

JOSEPH BERNITSKY, ALBERT BERNITSKY, VINCENT BERNITSKY and GEORGE STENULIS, Individually and Trading as BERNITSKY BROTHERS COAL COMPANY, SLOPE NO. 2,

Petitioners,

v.

UNITED STATES OF AMERICA,
United States Department of Justice, Washington, D. C.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

THOMAS B. RUTTER,
Counsel for Petitioners.

872 Public Ledger Building,
Independence Square,
Philadelphia, Pennsylvania. 19106
(215) 925-9200

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

TABLE OF CONTENTS.

	Page
OPINIONS BELOW	1
JURISDICTION	2
STATEMENT OF THE QUESTIONS PRESENTED	2
RELEVANT STATUTES AND RULES	3
STATEMENT OF THE CASE	7
REASONS FOR GRANTING THE WRIT	15
I. This Court Should Grant the Instant Petition for the Reason That the Decision of the Court Below Directly Conflicts With the Holdings of This Court in *Hatahley v. United States,* 351 U. S. 173 (1956), and *Indian Towing Co. v. United States,* 350 U. S. 61 (1955)	15
II. This Court Should Settle an Important Question of Federal Law Regarding the Liability of the Federal Government Pursuant to the Tort Claims Act for the Failure of Federal Agents to Exercise Due Care in the Enforcement of a Federal Statute or Regulation	24
III. This Court Should Exercise Its Supervisory Powers and Review the Decision of the Court Below in This Case Because the Court Below Deviated Radically From the Procedural and Substantive Rules Governing Disposition of a Case on a Motion for Summary Judgment	30
CONCLUSION	42
APPENDIX A—Court of Appeals Order Denying Petition for Rehearing	A1
APPENDIX B—Court of Appeals Opinion Issued on March 19, 1980	A3
APPENDIX C—District Court Opinion	A23

TABLE OF CITATIONS.

Cases Cited: Page

Bernitsky v. United States, 463 F. Supp. 1121 (E. D. Pa. 1979), aff'd, No. 79-1453 (3d Cir. March 19, 1980) 10, 13, 19, 23, 29, 30, 31

Hatahley v. United States, 351 U. S. 173 (1956) 15, 16, 17, 19, 20, 23

Indian Towing Co. v. United States, 350 U. S. 61 (1955) ...15, 20, 22, 23

Poller v. Columbia Broadcasting System, 368 U. S. 464 (1962) 41, 42

Statutes Cited:

Act of June 25, 1948, c. 646, 62 Stat. 928, 28 U. S. C. § 1254(1) 2

Clean Air Act Amendments of 1977, 91 Stat. 685, 1400, 42 U. S. C. §§ 7401, et seq.:

Generally 24

91 Stat. 1400, 1404, 42 U. S. C. § 7413 24

91 Stat. 1400, 42 U. S. C. § 7414 25

Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 742, 30 U. S. C. §§ 801, et seq.:

Generally 7, 8, 20, 23

83 Stat. 750, 30 U. S. C. § 814(b) 2, 3, 8, 15

Federal Mine Safety and Health Act of 1977, 91 Stat. 1290, 30 U. S. C. §§ 801, et seq.:

Generally 7, 18, 24

91 Stat. 1297, 30 U. S. C. § 813 24

91 Stat. 1300, 30 U. S. C. § 814 25

Federal Tort Claims Act, 62 Stat. 933, 982, 28 U. S. C. §§ 1346(b), 2671, et seq.:

Generally 1, 2, 9, 10, 15, 19, 20, 21, 24, 25, 27, 29, 32

62 Stat. 984, 28 U. S. C. § 2680(a) 3, 9

Occupational Safety and Health Act of 1970, 84 Stat. 1590, 29 U. S. C. §§ 651, et seq.:

Generally 24

84 Stat. 1598, 29 U. S. C. § 657 24

84 Stat. 1601, 29 U. S. C. §§ 658-659 25

TABLE OF CITATIONS (Continued).

Rule Cited: Page

Fed. R. Civ. P. 56 ..... 2, 4, 31, 42

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

And Now, this 10th day of July, 1980, Joseph Bernitsky, Albert Bernitsky, Vincent Bernitsky and George Stenulis, individually and trading as Bernitsky Brothers Coal Company, Slope No. 2, your Petitioners, respectfully pray that this Honorable Court grant a Writ of Certiorari to review a Judgment of the United States Court of Appeals for the Third Circuit dated March 19, 1980, by which that court affirmed the Judgment of the United States District Court for the Eastern District of Pennsylvania, and granted Respondent's Motion for Summary Judgment on the basis of the discretionary function exception to the Federal Government's liability for negligence under the Federal Tort Claims Act, 62 Stat. 933, 982, 28 U. S. C. §§ 1346(b), 2671, *et seq.* although the District Court had not passed upon the Motion for Summary Judgment but, rather, had granted a Motion to Dismiss on a legal theory—and in a procedural posture—entirely different from the theory and posture adopted by the Court of Appeals.

OPINIONS BELOW.

Attached hereto as Appendix A is a copy of the Order of the court below issued on April 11, 1980 by the United States Court of Appeals for the Third Circuit at its No. 79-1453 denying Petitioners' Petition for Rehearing; attached hereto as Appendix B is a copy of the Opinion of the court below issued on March 19, 1980 by the United States Court of Appeals for the Third Circuit at its No. 79-1453; and attached hereto as Appendix C is a copy of the Opinion issued in this case by the United States District Court for the Eastern District of Pennsylvania which is reported at 463 F. Supp. 1121 (1979).

JURISDICTION.

This Honorable Court has jurisdiction to grant a Writ of Certiorari pursuant to the Act of June 25, 1948, c. 646, 62 Stat. 928, 28 U. S. C. § 1254(1), the judgment of the United States Court of Appeals for the Third Circuit having been entered on March 19, 1980, Petitioners' Petition for Rehearing having been denied by the court below on April 11, 1980 and the instant Petition having been filed within ninety (90) days of that date.

STATEMENT OF THE QUESTIONS PRESENTED.

1. Is the Federal Government liable under the Federal Tort Claims Act, 62 Stat. 933, 982, 28 U. S. C. §§ 1346(b), 2671, *et seq.*, for the negligence of a federal coal mine inspector who issues an order of withdrawal closing a coal mine for a violation of the Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 742, 30 U. S. C. §§ 801, *et seq.*, where: (1) the steps previously taken by the operators to abate the violation had been specifically approved by the Mine Enforcement Safety Administration; (2) the order of withdrawal issued by the federal coal mine inspector prevented the operators from entering their coal mine to make necessary repairs at the working area of the coal mine; (3) the coal mine collapsed because the operators were prevented by the order of withdrawal from entering the coal mine to conduct repairs necessary to prevent the collapse of the coal mine; and (4) as the result of the collapse of the coal mine the operators lost approximately two million five hundred ninety-one thousand dollars ($2,591,000.00) worth of coal and equipment?

2. Does Fed. R. Civ. P. 56 prevent a United States Court of Appeals from granting a Motion for Summary

Judgment where: (1) the District Court, whose Judgment is up for review, has never passed on the Motion for Summary Judgment; (2) the Court of Appeals has failed to consider the entire record, including, *inter alia,* the pleadings and depositions filed of record; and (3) the entire record establishes that issues exist as to material facts?

RELEVANT STATUTES AND RULES.

Section 2680(a) of the Federal Tort Claims Act, 62 Stat. 984, 28 U. S. C. § 2680(a):

> "The provisions of this chapter and section 1346(b) of this title shall not apply to—
>
> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused. . . ."

Section 104(b) of the Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 750, 30 U. S. C. § 814(b):

> "Except as provided in subsection (i) of this section, if, upon any inspection of a coal mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard but the violation has not created an imminent danger, he shall issue a notice to the

operator or his agent fixing a reasonable time for the abatement of the violation. If, upon the expiration of the period of time as originally fixed or subsequently extended, an authorized representative of the Secretary finds that the violation has not been totally abated, and if he also finds that the period of time should not be further extended, he shall find the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to cause immediately all persons, except those referred to in subsection (d) of this section, to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that the violation has been abated."

Fed. R. Civ. P. 56:

"(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

"(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

"(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the

day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

"(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

"(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred

to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

"(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

"(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt."

STATEMENT OF THE CASE.

Petitioners [1] commenced this action against Respondent United States of America on March 19, 1976 by filing a Complaint with the Clerk of the United States District Court for the Eastern District of Pennsylvania seeking money damages flowing from the collapse of Petitioners' coal mine as a result of the negligence of federal coal mine inspectors. Petitioners filed an Amended Complaint on May 3, 1976, and a Second Amended Complaint on January 24, 1977.

The events which prompted Petitioners to institute this action began on August 11, 1971 when Petitioners were cited by a federal coal mine inspector for a violation of the regulations promulgated pursuant to the Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 742, 30 U. S. C. §§ 801, *et seq.* (hereinafter referred to as the "Coal Mine Act") [2] for failure to provide a sanitary toilet facility in the active working section of Petitioners' coal mine. Thereafter, Petitioners purchased a sanitary toilet facility, and on September 16, 1971 the violation for which Petitioners had been cited on August 11, 1971 was found to have been abated by the federal coal mine inspector who had issued the original citation.

For approximately two years, between September 16, 1971 and July 11, 1973, Petitioners utilized the toilet facility purchased with the knowledge and approval of agents, servants and employees of the Federal Government. However, on July 11, 1973 Petitioners were cited by a federal coal mine inspector for failure to have a sanitary

1. Petitioners own, operate and mine the Bernitsky Brothers Coal Company, Slope Number 2 Mine which is a small anthracite coal mine located in Silver Creek, Schuylkill County, Pennsylvania.

2. The Coal Mine Act has been replaced by the Federal Mine Safety and Health Act of 1977, 91 Stat. 1290, 30 U. S. C. §§ 801, *et seq.*

toilet facility in the active working section of the mine which was of an "approved type". On February 13, 1974 an order of withdrawal was issued pursuant to Section 104(b) of the Coal Mine Act, 83 Stat. 750, 30 U. S. C. § 814(b), preventing Petitioners from entering the coal mine to conduct mining operations. Because the order of withdrawal prohibited Petitioners from shoring up the coal mine, the mine collapsed in April 1974 resulting in the loss of more than two and one-half million dollars worth of coal and equipment. In April 1975 the order of withdrawal issued to Petitioners on February 13, 1974 was lifted even though the same sanitary toilet facility for which the order of withdrawal was issued was still being utilized by Petitioners.

Petitioners allege in their pleadings that the United States Government, acting by and through its duly authorized agents, representatives, servants and employees, carelessly and negligently issued the July 11, 1973 notice of violation and subsequent order of withdrawal closing Petitioners' coal mine, and that such negligence resulted in the collapse of the Bernitsky Brothers Coal Company Slope No. 2 Mine and consequent financial losses to Petitioners. Petitioners allege that the negligence of Respondent consisted of issuance of a citation and order of withdrawal when, in fact, the condition giving rise to the citation and order of withdrawal did not constitute a violation of the Coal Mine Act since the sanitary toilet facility being utilized by Petitioners in the active working section of their coal mine had been approved by Respondent.

Respondent filed its Answer to Petitioners' Second Amended Complaint on February 26, 1977 and generally denied the allegations set forth in Petitioners' Second Amended Complaint. In addition, Respondent set forth several affirmative defenses in its Answer to Petitioners' Second Amended Complaint, including, *inter alia*, that

Petitioners failed to state a claim upon which relief could be granted, and that the court lacked subject matter jurisdiction over Respondent because the acts complained of in Petitioners' Second Amended Complaint are specifically excluded from the Federal Tort Claims Act, 62 Stat. 933, 982, 28 U. S. C. §§ 1346(b), 2671, *et seq.* (hereinafter referred to as the "Tort Claims Act") by Section 2680(a) of the Tort Claims Act, 62 Stat. 984, 28 U. S. C. § 2680(a).

On December 8, 1977 Respondent filed a Motion to Dismiss or In the Alternative For Summary Judgment contending that: (1) the Coal Mine Act did not give rise to a private right of action against the United States; (2) the Coal Mine Act did not give rise to a duty on the part of the United States under the Tort Claims Act since no corresponding duty exists under the law of the Commonwealth of Pennsylvania; and (3) Petitioners' claims were barred by the discretionary function exception to the Federal Government's liability for negligence under the Tort Claims Act, 62 Stat. 984, 28 U. S. C. § 2680(a) (hereinafter referred to as the "discretionary function exception").

The United States District Court for the Eastern District of Pennsylvania (Troutman, J.) held that the Coal Mine Act did not give rise to a private right of action against the United States, and stated that:

> "Although the Government employees in question were acting pursuant to the Coal Mine Health and Safety Act of 1969, 30 U. S. C. § 801 *et seq.*, there is no indication that said Act was intended to create a private cause of action against the United States. The purpose of the Act is to protect the health and safety of miners, and to that end the Act provides for standards for safety and health, and enforcement procedures to ensure that such standards are met. Mine

operators have remedies, including both administrative and judicial review, if they feel certain conduct by enforcement officials was improper at any point, but there is simply nothing in the Act indicating that a cause of action has been created on behalf of mine operators against the United States as a result of alleged misconduct by officials in conducting inspections or otherwise enforcing the provisions of the Act. Accordingly, we hold that the Coal Mine [sic] and Safety Act of 1969 does not create an independent cause of action in this case." *Bernitsky v. United States,* 463 F. Supp. 1121, 1122-1123 (E. D. Pa. 1979).

The District Court also concluded that the Coal Mine Act did not give rise to a duty on the part of the United States under the Tort Claims Act, and stated:

"Additionally, there is nothing in the law of Pennsylvania indicating that a cause of action exists on behalf of coal mine operators for improper closure of coal mines under the provisions of the Coal Mine Health and Safety Act of 1969. See *Devlin Lumber and Supply Corp. v. United States,* 488 F. 2d 88 (4th Cir. 1973), *Davis v. United States,* 395 F. Supp. 793 (D. Neb. 1975), *affirmed per curiam,* 536 F. 2d 758 (8th Cir. 1976). In *Blessing v. United States,* 447 F. Supp. 1160 (E. D. Pa. 1978), Judge Becker held that under certain circumstances the United States could be liable to injured employees for an alleged improper inspection by Occupational Safety and Health Act inspectors, but grounded such considerations upon a finding that Pennsylvania recognizes the 'good Samaritan' rule in which one who undertakes to render service for another is liable for negligent rendering of said services if the negligence causes

injury. There is no equivalent Pennsylvania rule on which liability of the United States to coal mine operators can be grounded for damages allegedly resulting from improper closure or other enforcement activity under the Coal Mine Health and Safety Act of 1969.

"Similarly, the common law does not recognize a cause of action under these circumstances. Federal case law has repeatedly held that federal inspection does not create a tort duty. See *Kirk v. United States,* 161 F. Supp. 722 (D. Idaho 1958), *affirmed,* 270 F. 2d 110 (9th Cir. 1959); *Fisher v. United States,* 441 F. 2d 1288, 1292 (3d Cir. 1971), and cases cited therein; *Chaneyfield v. City of New York, et al.,* 525 F. 2d 1333 (2d Cir. 1975); *Zabala Clemente v. United States,* 567 F. 2d 1140 (1st Cir. 1977); *Social Security Administration Baltimore Federal Credit Union v. United States,* 138 F. Supp. 639 (D. Md. 1956); *Davis v. FDIC,* 369 F. Supp. 277 (D. Colo. 1974); *In re Franklin National Bank Securities Litigation,* 445 F. Supp. 723 (E. D. N. Y. 1978)." 463 F. Supp. at 1123.

Petitioners filed a Motion for Reargument with the United States District Court for the Eastern District of Pennsylvania on January 22, 1979, and Respondent opposed Petitioners' Motion for Reargument on January 26, 1979. Following a hearing regarding Petitioners' Motion for Reargument an Order was entered by the District Court on February 28, 1979 denying Petitioners' Motion to Vacate the Court's Order of January 11, 1979. Petitioners then filed a timely Notice of Appeal from the Order of the United States District Court for the Eastern District of Pennsylvania on March 1, 1979. Petitioners' appeal was docketed with the United States Court of Appeals for the Third Circuit on March 21, 1979 at its No. 79-1453.

Oral argument on the opposing briefs of Petitioners and Respondent was held before the United States Court of Appeals for the Third Circuit (Gibbons, Higginbotham and Sloviter, Circuit Judges) on November 16, 1979. On March 19, 1980 the Court of Appeals (per Sloviter, J.) issued its Judgment affirming the Judgment of the District Court. However, the Court of Appeals chose to "dispose of this case on other grounds" and never reached the underlying substantive issues of duty which had been passed upon by the District Court. Instead, the Court of Appeals ignored Respondent's Motion to Dismiss and granted, *mea sponte,* Respondent's Motion for Summary Judgment relying upon the discretionary function exception to the Federal Government's liability for negligence under the Tort Claims Act.[3] The Court of Appeals ruled at pages 8-10 of its opinion, that:

---

3. The Court of Appeals, in its opinion, stated that:

"The procedural posture of this case merits some comment. The district court granted the Government's motion to dismiss treating the issue raised as one of law. In this case the affidavits and accompanying material submitted in connection with the Government's Alternative Motion for Summary Judgment shed light on the propriety of a dismissal because of the discretionary function exception. Our review of the record shows that we have the factual basis upon which to make the determination relating to the application of the discretionary function provision. Since Bernitsky had a reasonable opportunity to present opposing affidavits and other evidence, and failed to show that there was any disputed issue of fact as to a material issue, a grant of summary judgment would have been appropriate. See note 3 *supra.* Therefore, we see no reason to remand the case to the district court for disposition, and for the sake of judicial economy we will affirm the dismissal on the basis of the discretionary function exception. *See Sprague v. Fitzpatrick,* 546 F. 2d 560, 563 n. 4 (3d Cir. 1976), *cert. denied,* 431 U. S. 937 (1977).

". . . Even though Bernitsky has sought to cast its claim in terms of negligence, a review of the material filed in connection with the Motion to Dismiss, or in the Alternative for Summary Judgment, establishes that plaintiff claims neither that there was any negligent inspection nor that there was negligence premised upon the failure to inspect. On the contrary, the inspection accurately disclosed that there was a nonconforming facility. Once that was evident, the inspector issued the notice of violation, within his statutory authority, 30 U. S. C. § 814(b) (1976), and, when the violation remained uncorrected after seven months and three extensions of time, the order was issued closing the mine. In essence, Bernitsky complains not of any negligent action but of regulatory enforcement action, *i.e.* that the mine was closed, which Bernitsky argues was not reasonable under the circumstances. It is precisely that kind of judgment which the discretionary function exception encompasses."

The Court of Appeals granted Respondent's Motion for Summary Judgment based upon the affidavits and deposition excerpts incorporated in Respondent's Motion. The Court of Appeals did not consider the deposition testimony filed of record in this case with the United States District Court as a whole.[4]

---

3. (Cont'd.)

Accordingly, we will affirm the judgment of the district court." *Bernitsky v. United States,* No. 79-1453, slip op. at 16-17 (3d Cir. March 19, 1980).

4. Specific portions of that testimony were incorporated in Petitioners' Petition for Rehearing filed with the Court of Appeals on April 1, 1980, and are set forth at pages 32-41, *infra.*

On April 1, 1980 Petitioners filed a Petition for Rehearing with the United States Court of Appeals for the Third Circuit, which Petition was denied by that court on April 11, 1980.

Petitioners petition herewith for review of the Judgment issued in this case by the United States Court of Appeals for the Third Circuit on March 19, 1980 and as to which rehearing was denied by that court's Order of April 11, 1980.

REASONS FOR GRANTING THE WRIT.

I. This Court Should Grant the Instant Petition for the Reason That the Decision of the Court Below Directly Conflicts With the Holdings of This Court in *Hatahley v. United States,* 351 U. S. 173 (1956), and *Indian Towing Co. v. United States,* 350 U. S. 61 (1955).

In *Indian Towing Co. v. United States,* 350 U. S. 61 (1955), this Court held that the discretionary function exception did not operate as a blanket exemption from liability for the Federal Government when its agents were engaging in "uniquely governmental" functions at the time of their negligence. This Court further limited the scope of the discretionary function exception in *Hatahley v. United States,* 351 U. S. 173 (1956), by holding that where agents of the Federal Government are authorized to act by a federal statute or regulation and they exceed the authority granted by the statute or regulation, the Federal Government is liable for their negligence and the discretionary function exception to the Federal Government's liability under the Tort Claims Act does not apply.

In the present case, federal coal mine inspectors issued a citation and order of withdrawal against Petitioners pursuant to Section 104(b) of the Coal Mine Act, 83 Stat. 750, 30 U. S. C. § 814(b), for failure to have a sanitary toilet facility of an "approved type" in the active working section of Petitioners' coal mine. However, Petitioners did have a sanitary toilet facility in the active working section of their coal mine which was *in fact approved.*[5] Under these circumstances the federal coal

5. *See* pages 32-41, *infra.* Whether the sanitary toilet facility in the active working section of Petitioners' coal mine was in fact approved by agents of Respondent is, of course, at worst a question of fact the final resolution of which should properly be determined at a trial on the merits.

mine inspector who issued the citation and order of withdrawal to Petitioners acted without statutory or regulatory authority because the Coal Mine Act does not authorize the imposition of sanctions against coal mine operators where no violation of the Coal Mine Act in fact exists. Therefore, the discretionary function exception does not apply in the present case. *Hatahley v. United States,* 351 U. S. at 180-181.

In *Hatahley* this Court considered the liability of the Federal Government for the alleged negligence of federal agents who attempted to enforce the Taylor Grazing Act and the Federal Range Code issued thereunder. The federal agents failed properly to comply with the provisions of the Federal Range Code and therefore acted without statutory authority. This Court stated, in *Hatahley,* that:

> "But, having concluded that there was no statutory authority, we are faced with the question whether the Government is liable under the Federal Tort Claims Act for wrongful and tortious acts of its employees committed in an attempt to enforce a federal statute which they administer. We believe there is such liability in the circumstances of this case.
>
> "Section 1346(b) of Title 28, United States Code, authorizes suits against the Government for 'loss of property . . . caused by the negligent or wrongful act . . . of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act . . . occurred.' It is clear that the federal agents here were acting within the scope of their employment under both state and federal law. Under the

law of Utah an employer is liable to third persons for the willful torts of his employees if the acts are committed in furtherance of the employer's interests or if the use of force could have been contemplated in the employment. Cf. *Barney v. Jewel Tea Co.*, 104 Utah 292, 139 P. 2d 878. Both of these conditions obtained here. The federal agents were attempting to enforce the federal range law, and such enforcement must contemplate at least the force used in removal of stock from the range. The fact that the agents did not have actual authority for the procedure they employed does not affect liability. There is an area, albeit a narrow one, in which a government agent, like a private agent, can act beyond his actual authority and yet within the scope of his employment. We note also that § 1346(b) provides for liability for 'wrongful' as well as 'negligent' acts. In an earlier case the Court has pointed out that the addition of this word was intended to include situations like this involving ' "trespasses" which might not be considered strictly negligent.' *Dalehite v. United States*, 346 U. S. 15, 45.

* * *

The first portion of section [2680](a) cannot apply here, since the government agents were not exercising due care in their enforcement of the federal law. 'Due care' implies at least some minimal concern for the rights of others. Here, the agents proceeded with complete disregard for the property rights of the petitioners. Nor can the second portion of (a) exempt the Government from liability. We are here not concerned with any problem of a 'discretionary function' under the Act, see Dalehite v. United States, supra.

> *These acts were wrongful trespasses not involving discretion on the part of the agents, and they do give rise to a claim compensable under the Federal Tort Claims Act.*" 351 U. S. at 180-181 (emphasis added).

Under the holding of this Court in *Hatahley* where an agent of the Federal Government acts outside of his statutory authority he commits a trespass,[6] and where he acts negligently, the Federal Government will be liable for the damages sustained by the victim of the trespass. Nevertheless the court below concluded that:

> "The record in this case discloses that the Mining Enforcement and Safety Administration sent representatives to meetings of inspectors at various district offices to call the inspectors' attention to the factors they should consider in exercising their discretion whether to issue notices and grant extensions. A speech, prepared by the Chief of Safety of MESA[7], and delivered on his behalf by Frank Henderson, a Coal Mine Specialist, at a district meeting attended by Inspector Updegrave, the inspector who issued the Withdrawal Order in this case, stressed the need for determination of what is a 'reasonable time' for the

6. Petitioners will be entitled to recover damages from Respondent under this Court's holding in *Hatahley* if they simply demonstrate that Respondent's agents committed "wrongful trespasses." 351 U. S. at 181.

7. The Mine Enforcement and Safety Administration was established as a subdivision of the United States Department of the Interior and was charged with enforcement of the Coal Mine Act. MESA has been replaced by MSHA, Mine Safety and Health Administration, which is a subdivision of the United States Department of Labor, and which is charged with enforcement of the Federal Mine Safety and Health Act of 1977, 91 Stat. 1290, 30 U. S. C. §§ 801, *et seq.*

> abatement period, and whether 'due diligence has been exercised in an attempt to gain compliance' before extensions are granted. It is apparent from the foregoing that the decisions regarding issuance of a notice of violation, extensions of time, and orders of withdrawal must be made by the individual inspectors on the basis of their experience and judgment, and therefore fall within the scope of the discretionary function exception. They are 'matters involving balancing of policy considerations in advancing the public interest.' *Griffin v. United States*, 500 F. 2d 1059, 1064 (3d Cir. 1974). Decision making as to investigation and enforcement, particularly when there are different types of enforcement action available, are discretionary judgments. *In re Air Crash Disaster Near Silver Plume, Colorado*, 445 F. Supp. 384, 401-04 (D. Kan. 1977); *see First National Bank in Albuquerque v. United States*, 552 F. 2d 370, 375-76 (10th Cir.), *cert. denied*, 434 U. S. 835 (1977). Thus, in making the determination of the course to follow, the MESA inspector must use his or her judgment as to the manner in which the statutory authority can best be effectuated, an act which cannot subject the government to tort liability." *Bernitsky v. United States*, No. 79-1453, slip op. at 13-14 (3d Cir. March 19, 1980).

This holding directly conflicts with this Court's decision in *Hatahley*. The manner in which federal coal mine inspectors arrived at the conclusion that they should not grant additional extensions of time for Petitioners to abate the condition resulting in issuance of the citation is not relevant to the determination of whether the Federal Government is liable pursuant to the Tort Claims Act

under the facts of the present case. Because the federal coal mine inspector who issued the order of withdrawal on February 13, 1974 acted without statutory authority—no violation of the Coal Mine Act in fact existed at Petitioners' coal mine because the sanitary toilet facility in the active working section of the coal mine was approved by Respondent—then the discretionary function exception does not apply in the present case. *Hatahley v. United States,* 351 U. S. at 181.

In *Indian Towing Co. v. United States,* 350 U. S. 61 (1955), this Court specifically held that the "uniquely governmental" nature of the activity is not determinative of the applicability of the discretionary function exception to the liability of the Federal Government under the Tort Claims Act. In *Indian Towing Co.,* Petitioner sought to recover for damage to the cargo of a barge which ran aground due to the alleged failure of the United States Coast Guard to properly maintain a lighthouse operated by the Coast Guard to guide vessels traveling in and about Chandeleur Island. This Court reversed the holding of the United States Court of Appeals for the Fifth Circuit and remanded the case to the United States District Court for the Eastern District of Louisiana stating that:

> "While the area of liability is circumscribed by certain provisions of the Federal Tort Claims Act, see 28 U. S. C. § 2680, all Government activity is inescapably 'uniquely governmental' in that it is performed by the Government. In a case in which the Federal Crop Insurance Corporation, a wholly Government-owned enterprise, was sought to be held liable on a crop-insurance policy on the theory that a private insurance company would be liable in the same situation, this Court stated: 'Government is not partly public or partly private, depending upon the

governmental pedigree of the type of a particular activity or the manner in which the Government conducts it.' *Federal Crop Insurance Corp. v. Merrill,* 332 U. S. 380, 383-384. On the other hand, it is hard to think of any governmental activity on the 'operational level,' our present concern, which is 'uniquely governmental,' in the sense that its kind has not at one time or another been, or could not conceivably be, privately performed.

There is nothing in the Tort Claims Act which shows that Congress intended to draw distinctions so finespun and capricious as to be almost incapable of being held in the mind for adequate formulation. The statute was the product of nearly thirty years of congressional consideration and was drawn with numerous substantive limitations and administrative safeguards. . . . The language of the statute does not support the Government's argument. Loose general statements in the legislative history to which the Government points seem directed mainly toward the 'discretionary function' exemption of § 2680 and are not persuasive. The broad and just purpose which the statute was designed to effect was to compensate the victims of negligence in the conduct of governmental activities in circumstances like unto those in which a private person would be liable and not to leave just treatment to the caprice and legislative burden of individual private laws. . . ." *Indian Towing Co. v. United States,* 350 U. S. at 67-69 (Frankfurter, J.)

This Court has refused to permit the discretionary function exception to operate as a "blanket exemption" to liability under the Tort Claims Act where the activity

involved is "uniquely governmental". As this Court further stated in *Indian Towing Co.:*

> "While the Government disavows a blanket exemption from liability for all official conduct furthering the 'uniquely governmental' activity in any way, it does claim that there can be no recovery based on the negligent performance of the activity itself, the so-called 'end-objective' of the particular governmental activity. Let us suppose that the Chief Petty Officer going in a Coast Guard car to inspect the light on Chandeleur Island first negligently ran over a pedestrian; later, while he was inspecting the light, he negligently tripped over a wire and injured someone else; he then forgot to inspect an outside connection and that night the patently defective connection broke and the light failed, causing a ship to go aground and its cargo of triple super phosphate to get wet; finally the Chief Petty Officer on his way out of the lighthouse touched a key to an uninsulated wire to see that it was carrying current, and the spark he produced caused a fire which sank a nearby barge carrying triple super phosphate. Under the Government's theory, some of these acts of negligence would be actionable, and some would not. But is there a rational ground, one that would carry conviction to minds not in the grip of technical obscurities, why there should be any difference in result? The acts were different in time and place but all were done in furtherance of the officer's task of inspecting the lighthouse and in furtherance of the Coast Guard's task in operating a light on Chandeleur Island. Moreover, if the United States were to permit the operation of private lighthouses—not at all inconceivable—the Government's basis of differentiation would be gone and the negligence charged in this case would be

> actionable. Yet there would be no change in the character of the Government's activity in the places where it operated a lighthouse, and we would be attributing bizarre motives to Congress were we to hold that it was predicating liability on such a completely fortuitous circumstance—the presence or absence of identical private activity." 350 U. S. at 66-67.

Therefore, the court below erroneously concluded that the nature of the "uniquely governmental" regulatory activity involved in the present case necessarily involved discretion.[8]

No discretion is granted by the Coal Mine Act to federal coal mine inspectors to issue citations and orders of withdrawal where a violation of the Coal Mine Act does not in fact exist. Therefore, the only consideration relevant to determining the liability of the Federal Government in the present case, under the holdings of this Court in *Hatahley v. United States,* 351 U. S. 173 (1956), and *Indian Towing Co. v. United States,* 350 U. S. 61 (1955), is whether the July 11, 1973 citation and February 13, 1974 order of withdrawal were properly issued in the present case. Petitioners contend that if they were in fact in compliance with the Coal Mine Act then the federal coal mine inspector did not have the statutory authority to issue the citation and order of withdrawal and the Federal Government is therefore liable. *Hatahley v. United States,* 351 U. S. 173 (1956); *Indian Towing Co. v. United States,* 350 U. S. 61 (1955).

---

8. The court below stated that:

> ". . . [I]n making the determination of the course to follow, the MESA inspector must use his or her judgment as to the manner in which the statutory authority can best be effectuated, an act which cannot subject the government to tort liability." *Bernitsky v. United States,* slip op. at 14.

II. This Court Should Settle an Important Question of Federal Law Regarding the Liability of the Federal Government Pursuant to the Tort Claims Act for the Failure of Federal Agents to Exercise Due Care in the Enforcement of a Federal Statute or Regulation.

This Court should grant the instant Petition and establish the criteria for determining whether an action brought under the Tort Claims Act for the negligence of agents of the Federal Government in enforcing a federal statute or regulation falls within the discretionary function exception to the liability of the Federal Government under the Tort Claims Act. The issue of the applicability of the discretionary function exception to actions commenced under the Tort Claims Act for the negligence of the Federal Government in enforcing federal statutes and regulations has not yet been decided by this Court. Federal regulation has been proliferating in recent years, especially in the areas of health and safety regulation.[9] The Federal Government has, therefore, become increasingly involved in private business and industry. Federal inspectors have been given the authority to enter private businesses to determine whether there is compliance with federal regulations.[10] Federal inspectors and agencies have been granted authority to impose severe penalties when it is determined that federal regulations have been

---

9. *See, e.g.*, Federal Mine Safety and Health Act of 1977, 91 Stat. 1290, 30 U. S. C. §§ 801, *et seq.*; Clean Air Act Amendments of 1977, 91 Stat. 685, 1400, 42 U. S. C. §§ 7401, *et seq.*; Occupational Safety and Health Act of 1970, 84 Stat. 1590, 29 U. S. C. §§ 651, *et seq.*

10. *See, e.g.*, 91 Stat. 1297, 30 U. S. C. § 813; 91 Stat. 1400, 1404, 42 U. S. C. § 7413; 84 Stat. 1598, 29 U. S. C. § 657.

disobeyed.[11] Federal regulatory authority, if abused, could be devastating to the victims of such abuse.

This Court should establish guidelines for the conduct of agents of the Federal Government who are engaged in regulatory activity. Victims of wrongful use of federal regulatory authority should not be left without a remedy because the Court has failed to define the limits of the discretionary function exception in cases like the present one.[12]

There is no coherent body of case law governing the applicability of the discretionary function exception to the liability of the Federal Government under the Tort Claims Act in cases involving negligent enforcement of federal regulatory statutes. The court below, attempting to find precedent upon which to base its decision in the present case, stated that:

> "There has been a considerable amount of difficulty, recognized by both the courts and the commentators, in applying the discretionary function exception. In the Supreme Court's initial interpretation of the provision, the Court stressed that the exception was designed to apply to those governmental functions which entail a policy judgment and decision. *Dalehite v. United States,* 346 U. S. 15, 36 (1953). 'It is the discretion of the executive or the administrator to act according to one's judgment of the best course' which Congress has protected. Id. at 34. Many of the later cases have focused on the policy

11. *See, e.g.*, 91 Stat. 1300, 30 U. S. C. § 814; 91 Stat. 1400, 42 U. S. C. § 7414; 84 Stat. 1601, 29 U. S. C. §§ 658-659.

12. The holding of the court below will, if permitted to stand, absolve the Federal Government from liability for the negligence of all inspectors in the field who are purportedly "enforcing" any federal regulatory statute.

judgment aspect of the circumstances in determining whether the exception is applicable. *See, e.g., Huntington Towers, Ltd. v. Franklin National Bank,* 559 F. 2d 863, 870 (2d Cir. 1977), *cert. denied,* 434 U. S. 1012 (1978); *First National Bank in Albuquerque v. United States,* 552 F. 2d 370, 374-75 (10th Cir.), *cert. denied,* 434 U. S. 835 (1977); *Griffin v. United States,* 500 F. 2d 1059, 1066-67 (3d Cir. 1974). Others have made the distinction between conduct at the planning level, which is considered exempt and conduct at the operational level, which is not. *See, e.g., Driscoll v. United States,* 525 F. 2d 136, 138 (9th Cir. 1975); *Spillway Marina, Inc. v. United States,* 445 F. 2d 876, 878 (10th Cir. 1971); *United Air Lines v. Wiener,* 335 F. 2d 379, 392-93 (9th Cir.), *cert. dismissed,* 379 U. S. 951 (1964); *Swanson v. United States,* 229 F. Supp. 217, 220 (N. D. Cal. 1964); *Wildwood Mink Ranch v. United States,* 218 F. Supp. 67, 76-77 (D. Minn. 1963). Yet another distinction which has been made, although now of questionable authority, is that between the sovereign functions of government, which were stated to be within the exemption, and the proprietary functions, which were not. *See, e.g., National Mfg. Co. v. United States,* 210 F. 2d 263, 277 (8th Cir.), *cert. denied,* 347 U. S. 967 (1954), *but see Indian Towing Co. v. United States,* 350 U. S. 61, 64-65 (1955).

"Although these distinctions may provide some guidance in explaining the result of the cases, they do not offer much assistance in the determination whether the activity in question in a particular case falls on the side of liability or immunity. . . ." *Bernitsky v. United States,* No. 79-1453, slip op. at 5-7 (3d Cir. March 19, 1980) (footnote omitted.)

The court below attempted to resolve the legal issues of this case by analogizing it to other cases brought under the Tort Claims Act in various jurisdictions and went on to state that:

> "Rather than engage in a semantic attempt to decide in which category this case falls, we believe it will be more productive to develop the factual similarities among the vast array of judicial precedent on this issue.
>
> "The affidavits and deposition testimony incorporated therein filed by the Government in support of its Motion, to which Bernitsky filed no opposing affidavits, have narrowed Bernitsky's claim to the allegation that the inspector negligently issued the Withdrawal Order, with the consequence being the collapse of the mine. Since the inspector concededly had the statutory authority to issue the Withdrawal Order [13] and accepting, as we must for this purpose, the causation alleged, the issue thus clearly emerges: Does the issuance of that Order, however arbitrary or negligent constitute the exercise of a discretionary function?
>
> "A review of the case precedent suggests a number of factual analogs. One line of cases holds that the issuance or refusal to issue a Government license or permit falls within the discretionary function exemption. *See Lawrence v. United States*, 381 F. 2d 989, 990-91 (9th Cir. 1967) (failure to issue permits to occupy portion of trust patent Indian land); *United*

13. Petitioners specifically dispute this factual finding of the court below. *See* pages 32-41, *infra*. Petitioners contend here, as they did in the court below, that the inspector acted *without* statutory authority to issue the February 13, 1974 order of withdrawal. *Id.*

States v. Morrell, 331 F. 2d 498, 502 (10th Cir.), *cert. denied,* 379 U. S. 879 (1964) (issuance of grazing permits even when officials allegedly knew the stock would stray upon and damage lands of plaintiffs); *Chournos v. United States,* 193 F. 2d 321, 323-24 (10th Cir. 1951), *cert. denied,* 343 U. S. 977 (1952) (denial of permit to graze on public lands); *United States v. Waylyn Corp.,* 130 F. Supp. 783, 787 (D. P. R. 1955), *aff'd on other grounds,* 231 F. 2d 544 (1st Cir.), *cert. denied,* 352 U. S. 827 (1956) (withholding occupancy permits); *Smith v. United States,* 101 F. Supp. 87, 88-89 (D. Colo. 1951), *appeal dismissed,* 196 F. 2d 222 (10th Cir. 1952) (reduction of plaintiff's grazing privileges).

"Another line of authority with some similarity to this case is that holding the decision to prosecute or not to prosecute falls within the discretionary function. *Smith v. United States,* 375 F. 2d 243, 247 (5th Cir.), *cert. denied,* 389 U. S. 841 (1967); *Brooks v. United States,* 152 F. Supp. 535, 537 (S. D. N. Y. 1957). The same is true of a decision when to institute and prosecute condemnation proceedings. *Goddard v. District of Columbia Redevelopment Land Agency,* 287 F. 2d 343, 345 (D. C. Cir.), *cert. denied,* 366 U. S. 910 (1961). The decision to abruptly close garbage dumps at Yellowstone National Park in connection with the management of grizzly bears within the park was held to entail the type of judgment exempted by the discretionary function provision, notwithstanding the claim that the decision resulted in the death of a camper. *Martin v. United States,* 546 F. 2d 1355, 1360 (9th Cir. 1976), *cert. denied,* 432 U. S. 906 (1977). Issuance of a cease and desist order by the F. D. I. C. if it believes the bank is

engaging in unsound practices is a determination left to the discretion of the agency. *Davis v. Federal Deposit Insurance Corporation,* 369 F. Supp. 277, 280 (D. Colo. 1974). In a case with facts somewhat parallel to the one under consideration, the court held a coal mine owner could not bring a Federal Tort Claims Act case claiming damages as a result of an administrative decision not to operate a coal mine seized by the Government under executive authority in furtherance of the war effort. *Old King Coal Co. v. United States,* 88 F. Supp. 124, 125 (S. D. Iowa 1949).

"Bernitsky seeks to distinguish the discretionary function situation by bringing itself within the line of authority which appears to authorize a Federal Tort Claims Act claim for negligent inspection by government agents who fail to uncover dangerous conditions ultimately causing harm to third persons. *Blessing v. United States,* 447 F. Supp. 1160 (E. D. Pa. 1978); *Toppi v. United States,* 327 F. Supp. 1277 (E. D. Pa. 1971). It also relies on cases under Pennsylvania law permitting a similar cause of action against private parties for negligent inspection. *Knight v. Otis Elevator Co.,* 596 F. 2d 84 (3d Cir. 1979); *Evans v. Otis Elevator Co.,* 403 Pa. 13, 168 A. 2d 573 (1961).

"Those cases are inapplicable in this situation." *Bernitsky v. United States,* slip op. at 7-9 (footnote omitted.)

Future uncertainty of parties and courts will be avoided if this Court defines the scope of the discretionary function exception to the liability of the Federal Government under the Tort Claims Act where, as is alleged in the present case, agents of the Federal Government fail to exercise due care in enforcing a federal regulatory statute.

III. This Court Should Exercise Its Supervisory Powers and Review the Decision of the Court Below in This Case Because the Court Below Deviated Radically From the Procedural and Substantive Rules Governing Disposition of a Case on a Motion for Summary Judgment.

The United States District Court for the Eastern District of Pennsylvania dismissed the instant action concluding that Petitioners had failed to state a claim upon which relief could be granted. *Bernitsky v. United States,* 463 F. Supp. 1121, 1123 (1979). The court below affirmed the judgment of the district court by granting the Government's Motion for Summary Judgment stating:

> "The procedural posture of this case merits some comment. The district court granted the Government's motion to dismiss treating the issue raised as one of law. In this case the affidavits and accompanying material submitted in connection with the Government's Alternative Motion for Summary Judgment shed light on the propriety of a dismissal because of the discretionary function exception. Our review of the record shows that we have the factual basis upon which to make the determination relating to the application of the discretionary function provision. Since Bernitsky had a reasonable opportunity to present opposing affidavits and other evidence, and failed to show that there was any disputed issue of fact as to a material issue, a grant of summary judgment would have been appropriate. See note 3 *supra.* Therefore, we see no reason to remand the case to the district court for disposition, and for the sake of judicial economy we will affirm the dismissal on the basis of the discretionary function exception. *See Sprague v. Fitzpatrick,* 546 F. 2d 560, 563 n. 4 (3d Cir. 1976), *cert. denied,* 431 U. S. 937 (1977).

> "Accordingly, we will affirm the judgment of the district court." *Bernitsky v. United States,* No. 1453, slip. op. at 16-17 (3d Cir. March 19, 1980).

The court below clearly erred in granting Respondent's Motion for Summary Judgment. Fed. R. Civ. P. 56(c) specfically provides that:

> "The motion [for summary judgment] shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. *The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . . .*" (Emphasis added.)

The court below by its own admission considered only the affidavits offered by Respondent,[14] which were unop-

---

14. The Court below stated that:

"In support of its Motion to Dismiss or in the Alternative for Summary Judgment, the Government presented affidavits and deposition testimony from several coal mine inspectors that they had repeatedly inspected the mine and determined that the underground sanitary facility provided by Bernitsky was not on the approved list. Despite the allegations in Bernitsky's complaint that Government agents negligently failed to determine that the facility was approved and that they failed to advise Bernitsky and others that the facility was approved, Bernitsky failed to present any factual evidence in its Answer to the Government Motion controverting the Government evidence that the facility was unapproved at the time the Notice of Violation was issued." *Bernitsky v. United States,* slip op. at note 2.

posed by Petitioners,[15] in granting Respondent's Motion for Summary Judgment. The court below chose to ignore the pleadings filed by Petitioners and the deposition testimony of Petitioners and federal coal mine inspectors employed by Respondent which at the very least established that an issue of material fact existed in the present case—whether the sanitary toilet facility utilized by Petitioners in the active working section of their coal mine was in fact approved.[16]

For example, the sworn testimony of Petitioner Joseph Bernitsky under interrogation by counsel for the United States on September 2, 1976, at pages 29-30, was as follows:

> "Q. All right? Our records and the inspection report indicate, and I'll indicate to you, that Mr.

15. Petitioners acknowledge that they did not file affidavits in opposition to the affidavits filed by Respondent. The reason that Petitioners did not oppose Respondent's affidavits, as was explained to the court below in Petitioners' Petition for Rehearing, was that the affidavits offered by Respondent alleged that the sanitary toilet facility was not on an approved list. Petitioners did not contend in the courts below and do not contend here that the sanitary toilet facility was on any approved list. Moreover, Petitioners alleged in their pleadings, and those allegations are supported by deposition testimony of record in the district court, which was ignored by the court below, that *although it was not on an approved list the toilet facility was in fact accepted as an approved facility before the withdrawal order* dated February 13, 1974 was issued to Petitioners, *and was again in fact accepted as an approved facility after the withdrawal order was terminated.*

16. Petitioners contended in the courts below, and contend here, that if the sanitary toilet facility was in fact approved, then the issuance of a citation and order of withdrawal for failure to have a sanitary toilet facility of an "approved type" at any time after such approval constituted negligence which would give rise to a cause of action against the federal government under the Tort Claims Act. *See* pages 15-23, *supra.*

Schoffstall was at your mine on July 11 of 1973 and issued a notice of violation for failure to have an approved toilet facility. Now, my question is: Do you have any recollection of meeting Mr. Schoffstall at your mine concerning this second notice?

"A. I can't answer that for sure; as I said before, there were so many inspections made. The only thing enters my mind is that *the toilet was approved when we first got it;* and that if he was referring to that as being illegal, then I sort of ignored it, in a sense, because I didn't think he was right. But if they accepted that—this is where it makes me feel I don't know for sure if I was there or not, or if I let that issue go by. I don't know; I don't know for sure.

"Q. As I understand it, you don't recall whether or not you talked to Schoffstall; and your recollection is that either you weren't there and talked to him when he was there; or that he was and that because they had approved the facility before, that you didn't want anything to do with it and you just forgot about it?

"A. Well, not—well, I don't want it to sound so rude. But *I felt, myself, that it was an approved toilet; maybe he doesn't know what he's talking about. . . .*" (Emphasis added.)

Petitioner Joseph Bernitsky also testified, at pages 33-34 of his deposition taken on September 2, 1976, as follows:

"Q. Do you remember when the mine was closed?

"A. I do remember when this mine was closed.

"Q. When Mr. Updegrave came out?

"A. Yes; very, very vividly.

"Q. Do you remember talking to your partners about the toilet facility before that day? is my question.

"A. The conversation came up about the toilet, yes. It would be normal to talk about business, you know; these are some of the things.

"Q. Let me ask you this: Was there ever any discussion prior to the closure of the mine about getting a facility that was approved?

"A. As I said before, I can't say for sure; but I think George made reference somewhere about this toilet; and if he wrote to the company or not—somewhere in the back of my mind, I think he wrote to the very same company we have to see if it was approved.

"Q. Do you know whether or not you had any discussions with your partners before the mine was closed about buying another one that was approved, that you knew was already approved?

"A. Well, we talked about it. *We talked about another toilet; but, at the time, it seems that they accepted this toilet and they had it for two years, and all of a sudden it was not approved.* And this is what I think sort of left a bitter taste in our mouths. And we talked about it; and I don't know if George did or did not inquire as to another toilet. I don't know.

"Q. Do you know whether or not there was ever any decision made prior to closure of the mine that your partnership would not purchase another facility?

"A. No. I don't think we spoke negatively about it that I know of, you know; but *we always felt in the back of our minds, we couldn't understand it. It was approved at first; after a number of years, then it wasn't approved.* This is what sort of didn't go too well with us." (Emphasis added.)

Upon further interrogation by counsel for the United States during the course of the same deposition, Petitioner Joseph Bernitsky testified, at pages 56-57, as follows:

"Q. Following the notice that was issued by Mr. Schoffstall for failure to have the approved facility, do you know whether or not the mine initiated any type of appeal of that notice?—to take it to a higher authority?

"A. I don't recall; unless—well, I think the Bureau was called on that. I'm not sure. I don't know if we talked to Mr. Laird about that. I don't know for sure, but I know that there were some inquiries made somewhere along the line to find out about this.

"Q. Do you know whether or not, following the closure order that was issued by Mr. Updegrave for failure to have an approved sanitary facility, the mine ever initiated an appeal, a formal appeal, to a higher authority within the Department of Interior to contest the closure order?

"A. No, I truthfully felt that they would be back very shortly and try to correct this measure somehow.

"Q. That who would come back, sir?

"A. That may be the Bureau would come back.

"Q. For what purpose?

"A. Talk this over and see—*it was so sudden, we couldn't believe it. They said the mine was closed; it was closed.* You want to see—well, we were in a state of disgust anyway. I'm getting to a point now. This became harassment as far as we're concerned. We thought we'd wait and see what—of course, we had other work to do. *We were on a repair detail that kept us busy until they made up their minds and find out for sure why this toilet couldn't be accepted—which, by the way, was accepted later on; they accepted that same toilet, but that was some time later on.* (Emphasis added.)

The sworn testimony of Petitioner Joseph Bernitsky under interrogation by counsel for the United States on September 2, 1976, at pages 67-70 was as follows:

"Q. Yes. Do you remember Mr. Laird coming out to the mine?

"A. I do remember him and a Mr. Johnson that came to the garage.

"Q. Do you remember what Mr. Laird told you at that time?

"A. I told you; I repeated that question before, what he told me. Oh, did I?

"Q. No, I don't think so.

"A. Didn't I? I'm sorry.

"Q. Relate for me the conversation you had with Mr. Laird and Mr. Johnson that day at the garage.

"A. Well, he happened to get me while I was on my way to the strip mine, which is in the opposite direction of the mine.

"Q. Is this outside the mine property where you met?

"A. Yes. *And he says, 'Joe,' he says, 'I'd like to talk to you.'* He was very nice, I always thought he was very nice. He said, 'Joe, we have a'—to the best of my recollection—no; I'll try to picture it. *He says, 'We have to apologize. We want you to go back. We made a mistake.'* And the exact words, the way he put it, I know he said, 'if you were to take this to court,' he says, 'we'd lose. We admit we'd lose.' He said, 'If you took it to court, you'd make an ass out of yourself. Our lawyers would laugh at your lawyers if you take it to court. *We admit, so take the Porta Potti,' or whatever you called it, 'and go back to work; we terminate the closure order.'*

"Q. Do you know what proceeding he was referring to?

"A. I don't know; I don't think it was anything meaning it would go to court. He said, 'Even if this would go to court,' he says, 'our lawyer would laugh at your lawyers' sort of to bring this to court, 'when we admit we did wrong.' *That's exactly the way he put it: 'We admit we did wrong. Go back with our blessing.'*

"I said, 'Is this some kind of trick?'

"He said, 'No, it isn't.'"

* * *

"I told George and Al. They sort of felt sort of bitterness, that it was a trick. Why should the man come along and say, 'Go back to work,' after all that hullabaloo? How could they take that order. . . . Perhaps they have the right to do that; but it didn't seem right to George and them at the time, I guess. But this is the conversation I had with Mr. Laird. He admitted that they were wrong in doing so—take the same thing back, and we still have the same toilet right now." (Emphasis added.)

The sworn testimony of Petitioner Albert Bernitsky, given under interrogation by counsel for the United States on September 2, 1976, at pages 11-12 and 20-21, was as follows:

"Q. Did you ever have any conversation with Mr. Stella up to today about a toilet facility at the mine?

"A. Well, I don't know what inspector it was, but *when we got this toilet I asked the inspector, 'Is that all right?' And he looked at it and he said it's all right by him; and also another inspector, I can't tell you his name because I don't know it, he said it's all right by him, too, as far as he is concerned.*

"Q. This would be the Stello toilet?
"A. I wouldn't say.
"Q. The Stello toilet?
"A. I imagine *the toilet we have now.*

* * *

"Q. Did Mr. Updegrave on the day he closed the mine make the statement in your presence to the effect that if you got a toilet, he wouldn't close you down?—an approved toilet, he wouldn't close you down?

"A. No; I didn't hear him say that, no. He says, 'The mine is closed,' he said, 'with that toilet.' That toilet was good. *I don't know how many inspections they made and they all agreed that it was all right. All at once, it wasn't any good.*" (Emphasis added.)

The sworn testimony of Petitioner Vincent Bernitsky, given under interrogation by counsel for the United States on September 2, 1976, at page 20, was as follows:

"Q. Did you ever tell any of the federal inspectors before the mine was closed, or express your opinion to them, that you had one toilet and you didn't want to get another one or weren't going to get another one?

"A. I don't think so; I may have—I don't know. *I often wondered why it was all right for the couple years that we had it and then all of a sudden we have to get a new one. I may have expressed that and tried to find out. Maybe asked them why.*

"Q. *Did you ever get any explanation?*

"A. *No.*" (Emphasis added.)

Lastly, the sworn testimony of Federal Coal Mine Inspector Dean Updegrave, given on July 6, 1976 at pages 11-15—which sworn testimony is uncontradicted by any evidence of record in this case—was as follows:

"Q. *Do you know if the mine was subsequently reopened?*

"A. Reopened?

"Q. Yes.

"A. *I did terminate this order.*

"Q. At what date?

"A. I'll have to look. Do you have my notes? I'd like to look at my notes there to refresh my memory, if I may.

"Q. I have no objection.

"A. *It was soon after we had appeared in court here in Philadelphia that this order was terminated.* I don't think I have the date in here—no, I don't have the date in there, but it was terminated.

"Q. Can you tell me why the order was terminated?

"A. The order was terminated through an understanding that I had with the attorneys for the Interior Department.

* * *

"Q. *Was your understanding to terminate the order based upon any change in the facility, the underground toilet facility?*

"A. *No, sir.*

"Q. In other words—I don't want to put words into your mouth—*the facility which is there now*—

"A. *Is still the same.*

"Q. —*is still the same facility?*

"A. *Right, yes.*

"Q. Let me go back a second, I know you didn't make the inspection, but can you tell me why the facility was not approved initially?

"MR. RUVOLO [Counsel for the United States]: If you know.

"MR. PINSLY [Counsel for Plaintiffs/Petitioners]: If you know. If you don't know, you don't know.

"MR. RUVOLO: What did you mean by 'approved'?

"MR. PINSLY: Why the facility that was there initially was not approved as—

"MR. RUVOLO: Not on the approved list?

"MR. PINSLY: Well, not approved by the inspector.

"MR. RUVOLO: On July 11, 1973.

"MR. PINSLY: Yes. If you know.

"A. Why it was not approved by the inspector on July 11?

"Q. Yes.

"A. Because it did not conform with the criteria.

"Q. *When you agreed to terminate the order, did the toilet comply with the criteria then?*

"A. *No, sir, it did not.*

"Q. Can you explain to me a little bit more about your agreement with the attorneys?

* * *

"A. He gave me no reasons.

"Q. But this understanding, this conversation you had pertaining to the agreement was based upon the knowledge of the fact that the underground facility was identical to that which was there on July 11, 1973 when the notice was issued; isn't that correct?

"MR. RUVOLO: I object to the form of the question.

"MR. PINSLY: Would you like me to repeat the question?

"THE WITNESS: Yes, rephrase it, please, or repeat it.

"Q. (Continuing) *The agreement and conversations which you had with your attorneys at that time, that agreement and conversation was undertaken with the knowledge that the facility which was in the ground at that time was the same facility as existed on July 11, 1973?*

"MR. RUVOLO: Same objection.

"A. *Yes, it was.*
"Q. *Is this facility on the approved list today?*
"A. *It is not.*

In *Poller v. Columbia Broadcasting System*, 368 U. S. 464 (1962), this Court explained the circumstances under which summary judgment is appropriate stating that:

"Summary judgment should be entered only when the pleadings, depositions, affidavits, and admissions filed in the case 'show that [except as to the amount of damages] there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' Rule 56(c), Fed. Rules Civ. Proc. This rule authorizes summary judgment 'only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, . . . [and where] no genuine issue remains for trial . . . [for] the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try.' *Sartor v. Arkansas Natural Gas Corp.*, 321 U. S. 620, 627 (1944)." 368 U. S. at 467 (Emphasis added.)

The granting of Respondent's Motion for Summary Judgment by the court below radically deviated from the accepted law governing the granting of such motions. Fed. R. Civ. P. 56(c); *Poller v. Columbia Broadcasting System*, 368 U. S. at 467. The court below neglected to consider the entire record before the district court. Specifically, the court below ignored lengthy deposition testimony of Petitioners and Respondent that the sanitary toilet facility in the active working section of Petitioners' coal mine was in fact approved by Respondent prior to the issuance of the July 11, 1973 citation to Petitioners, and after the February 13, 1974 order of withdrawal was lifted. Therefore, the conclusion reached by the court below—that no issues of material fact existed in this case—was improper, was reached as a result of a clear error in applying the law governing motions for summary judgment and should be reviewed by this Court.

CONCLUSION.

For the reasons set forth above, Petitioners respectfully pray that this Court issue its Writ of Certiorari directed to the United States Court of Appeals for the Third Circuit so as to bring before it for briefing, argument and decision the important questions of federal statutory and procedural law presented by the instant Petition.

Respectfully submitted,

THOMAS B. RUTTER,
Counsel for Petitioners.

872 Public Ledger Building,
Independence Square,
Philadelphia, Pennsylvania. 19106
(215) 925-9200.

APPENDIX A.

ORDER OF APRIL 11, 1980.

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 79-1453

Bernitsky, Joseph; et al.

vs.

UNITED STATES OF AMERICA, United States Department of Justice, Washington, D. C.

Joseph Bernitsky, Albert Bernitsky, Vincent Bernitsky and George Stenulis,
Appellants

(D. C. Civil No. 76-0841)

SUR PETITION FOR REHEARING

Present: GIBBONS, HIGGINBOTHAM and SLOVITER, *Circuit Judges*

The petition for rehearing filed by Appellants, Joseph Bernitsky, Albert Bernitsky, Vincent Bernitsky and George Stenulis, individually and trading as Bernitsky Brothers Coal Company, Slope No. 2 in the above entitled case

having been submitted to the judges who participated in the decision of this court and no judge who concurred in the decision having asked for rehearing, the petition for rehearing is denied.

By the Court,

DOLORES K. SLOVITER
Judge

Dated: April 11, 1980

APPENDIX B.

OPINION OF THE U. S. COURT OF APPEALS FOR THE THIRD CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-1453

JOSEPH BERNITSKY; ALBERT BERNITSKY; VINCENT BERNITSKY and GEORGE STENULIS, Individually and trading as Bernitsky Brothers Coal Company, Slope No. 2

v.

UNITED STATES OF AMERICA, United States Department of Justice, Washington, D. C.

Joseph Bernitsky, Albert Bernitsky, Vincent Bernitsky, and George Stenulis, *Appellants*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

D. C. Civil No. 76-0841

Argued November 16, 1979
Before: GIBBONS, HIGGINBOTHAM and SLOVITER, *Circuit Judges*

(Opinion filed March 19, 1980)

Thomas B. Rutter, Esq. (Argued)
872 Public Ledger Building
Philadelphia, PA 19106
Attorneys for Appellants

Robert S. Forster, Jr., Esquire
Assistant United States Attorney
Raymond A. Nowak, Esq. (Argued)
Charles E. Mandolia, Esq.
Attorneys, Torts Branch Civil Division
Department of Justice
Washington, D. C. 20530
Attorneys for Appellee

[2]

OPINION OF THE COURT

SLOVITER, *Circuit Judge*

The issue on appeal in this case is the scope of the discretionary function exception of the Federal Tort Claims Act.

On July 11, 1973 a Federal Mine Safety Inspector, acting pursuant to the Federal Coal Mine Health & Safety Act of 1969, 30 U. S. C. § 801 *et seq.* (hereinafter FCMHSA), inspected the mine owned and operated by appellant, Bernitsky Brothers Coal Company (hereinafter Bernitsky), located at New Philadelphia, Schuylkill County. Among the items inspected was whether the toilet facility complied with the updated list of "Approved Underground and Surface Sanitary Facilities" promulgated by The Bureau of Mines which had been revised

April 1973 and distributed to the local mine inspectors on June 28, 1973. The inspector found that the toilet facility at the mine was not on the approved list and he served a Notice of Violation on Bernitsky immediately following his inspection. Approved toilet facilities were available in the vicinity of the mine at a cost of $79.00 but Bernitsky did not purchase a complying toilet nor did it utilize the available administrative and judicial remedies in an attempt to have the Notice of Violation vacated. Over the next seven months, at Bernitsky's request the date for compliance with the Notice was extended three times by mine inspectors. Finally, on February 13, 1974 the Mining Enforcement and Safety Administration (hereinafter MESA), issued a Withdrawal Order pursuant to Section 104(b), of the statute, 30 U. S. C. § 814(b) (1976), barring any access to the mine other than that required to abate the violations. In April 1974 portions of the mine collapsed. Bernitsky claims that as a result of the collapse various mining tools and equipment were damaged and it could not extract certain amounts of coal, causing damage totaling

[3]

$2,591,000 which it seeks to recover from the federal government through this action. One cannot resist commenting that for want of a nail, the kingdom was lost.

Bernitsky filed suit on March 19, 1976 pursuant to the Federal Tort Claims Act, 28 U. S. C. §§ 1346(b), 2671 *et seq.* (1976). The complaint alleges that the Notice of Violation and subsequent Order of Withdrawal barring access to the mine were issued negligently and caused the mine's collapse by preventing Bernitsky's employees from performing the mining and maintenance operations which were necessary to prevent the collapse. Following more

than two years of discovery, the United States filed a Motion to Dismiss or in the Alternative for Summary Judgment on December 8, 1978 supported by affidavits and deposition testimony. On January 11, 1979, the district court ruled that the FCMHSA did not give rise to a private right of action by a mine operator and that there was no liability under the Federal Tort Claims Act because Pennsylvania would not impose liability under the circumstances of this case. *Bernitsky v. United States*, 463 F. Supp. 1121 (E. D. Pa. 1979). Accordingly, the action was dismissed.

On appeal, the appellant concedes that it has no private right of action accruing under the FCMHSA. It relies solely on its claim under the Federal Tort Claims Act.

The operative provision of that statute subjects the United States to liability:

> for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

[4]

28 U. S. C. § 1346(b) (1976). Because liability of the United States is contingent on liability under the "law of the place where the act or omission occurred", in this case Pennsylvania, Bernitsky focuses a considerable portion of its argument on an attempt to establish that under the law of the Commonwealth of Pennsylvania, the circumstances set forth above would give rise to a cause of action for

negligence. We need not consider the validity of this argument because we dispose of this case on other grounds.

In its Answer, the United States pleaded the affirmative defense that the court lacked subject matter jurisdiction because the acts complained of are specifically excluded from the Federal Tort Claims Act by the provision exempting acts within the discretionary function of United States employees. This was also one of the bases urged by the United States in its Motion to Dismiss or in the Alternative for Summary Judgment. Although the exception was not the basis for the district court's dismissal of the action, we deem it appropriate to consider its applicability as an initial matter since it involves the central issue of the scope of the United States' surrender of its immunity to suit by passage of the Federal Tort Claims Act. We can do so because it is well established that we are free to affirm the judgment of the district court on any basis which finds support in the record. *Harold Friedman, Inc. v. Thorofare Markets, Inc.*, 587 F. 2d 127, 140 (3d Cir. 1978); *Fairview Park Excavating Co. v. Al Monzo Construction Co.*, 560 F. 2d 1122, 1123 n. 1 (3d Cir. 1977); *United States v. Pennsylvania*, 533 F. 2d 107, 110 n. 7 (3d Cir. 1976). Because we consider affidavits and accompanying material presented in connection with the Government's Alternative Motion for Summary Judgment which have not been controverted by opposing affidavits, and which demonstrate there is no genuine issue as to any material fact, Fed. R. Civ. P. 56, we can review the district court's dismissal under the

[5]

standard of the propriety of a grant of summary judgment. *See First State Bank of Hudson County v. United States*, 599 F. 2d 558, 562 (3d Cir. 1979).

The boundaries of the sovereign immunity waived by the Federal Tort Claims Act are delineated by the statutory provision excepting certain claims. 28 U. S. C. § 2680 (1976). The discretionary function exception provides:

> The provisions of this chapter and section 1346(b) of this title shall not apply to—
>
> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

Id. § 2680(a).

This encompasses two discrete claims: the first excepting acts or omissions of governmental employees in carrying out statutes or regulations and the second excepting acts of discretion in the performance of governmental functions or duty. It is generally the latter phrase which is considered the discretionary function exemption.

There has been a considerable amount of difficulty, recognized by both the courts and the commentators, in applying the discretionary function exception.[1] In the

1. See Dupree v. United States, 247 F. 2d 819, 825 (3d Cir. 1957); Jayson, *Application of the Discretionary Function Exception, Symposium on the Federal Torts Claim Act,* 24 Fed. B. J. 153 (1964); Reynolds, *The Discretionary Function Exception of the Federal Tort Claims Act,* 57 Geo. L. J. 81, 82 (1968).

[6]

Supreme Court's initial interpretation of the provision, the Court stressed that the exception was designed to apply to those governmental functions which entail a policy judgment and decision. *Dalehite v. United States,* 346 U. S. 15, 36 (1953). "It is the discretion of the executive or the administrator to act according to one's judgment of the best course" which Congress has protected. Id. at 34. Many of the later cases have focused on the policy judgment aspect of the circumstances in determining whether the exception is applicable. *See, e.g., Huntington Towers, Ltd. v. Franklin National Bank,* 559 F. 2d 863, 870 (2d Cir. 1977), *cert. denied,* 434 U. S. 1012 (1978); *First National Bank in Albuquerque v. United States,* 552 F. 2d 370, 374-75 (10th Cir.), *cert. denied,* 434 U. S. 835 (1977); *Griffin v. United States,* 500 F. 2d 1059, 1066-67 (3d Cir. 1974). Others have made the distinction between conduct at the planning level, which is considered exempt, and conduct at the operational level, which is not. *See, e.g., Driscoll v. United States,* 525 F. 2d 136, 138 (9th Cir. 1975); *Spillway Marina, Inc. v. United States,* 445 F. 2d 876, 878 (10th Cir. 1971); *United Air Lines v. Wiener,* 335 F. 2d 379, 392-93 (9th Cir.), *cert. dismissed,* 379 U. S. 951 (1964); *Swanson v. United States,* 229 F. Supp. 217, 220 (N. D. Cal. 1964); *Wildwood Mink Ranch v. United States,* 218 F. Supp. 67, 76-77 (D. Minn. 1963). Yet another distinction which has been made, although now of questionable authority, is that between the sovereign functions of government, which were stated to be within the exemption, and the proprietary functions, which were not. *See, e.g., National Mfg. Co. v. United States,* 210 F. 2d 263, 277 (8th Cir.), *cert. denied,* 347 U. S. 967 (1954),

but see Indian Towing Co. v. United States, 350 U. S. 61, 64-65 (1955).

Although these distinctions may provide some guidance in explaining the result of the cases, they do not offer much assistance in the determination whether the

[7]

activity in question in a particular case falls on the side of liability or immunity. Rather than engage in a semantic attempt to decide in which category this case falls, we believe it will be more productive to develop the factual similarities among the vast array of judicial precedent on this issue.

The affidavits and deposition testimony incorporated therein filed by the Government in support of its Motion, to which Bernitsky filed no opposing affidavits, have narrowed Bernitsky's claim to the allegation that the inspector negligently issued the Withdrawal Order,[2] with the consequence being the collapse of the mine. Since the inspector concededly had the statutory authority to issue the Withdrawal Order and accepting, as we must for this purpose, the causation alleged, the issue thus clearly emerges: Does

2. In support of its Motion to Dismiss or in the Alternative for Summary Judgment, the Government presented affidavits and deposition testimony from several coal mine inspectors that they had repeatedly inspected the mine and determined that the underground sanitary facility provided by Bernitsky was not on the approved list. Despite the allegations in Bernitsky's complaint that Government agents negligently failed to determine that the facility was approved and that they failed to advise Bernitsky and others that the facility was approved, Bernitsky failed to present any factual evidence in its Answer to the Government Motion controverting the Government evidence that the facility was unapproved at the time the Notice of Violation was issued.

the issuance of that Order, however arbitrary or negligent, constitute the exercise of a discretionary function?

A review of the case precedent suggests a number of factual analogs. One line of cases holds that the issuance or refusal to issue a Government license or permit falls within the discretionary function exemption. *See Lawrence v. United States,* 381 F. 2d 989, 990-91 (9th Cir. 1967) (failure to issue permits to occupy portion of trust patent Indian land); *United States v. Morrell,* 331 F. 2d 498, 502 (10th Cir.), *cert. denied,* 379 U. S. 879

[8]

(1964) (issuance of grazing permits even when officials allegedly knew the stock would stray upon and damage lands of plaintiffs); *Chournos v. United States,* 193 F. 2d 321, 323-24 (10th Cir. 1951), *cert. denied,* 343 U. S. 977 (1952) (denial of permit to graze on public lands); *United States v. Waylyn Corp.,* 130 F. Supp. 783, 787 (D. P. R. 1955), *aff'd on other grounds,* 231 F. 2d 544 (1st Cir.), *cert. denied,* 352 U. S. 827 (1956) (withholding occupancy permits); *Smith v. United States,* 101 F. Supp. 87, 88-89 (D. Colo. 1951), *appeal dismissed,* 196 F. 2d 222 (10th Cir. 1952) (reduction of plaintiff's grazing privileges).

Another line of authority with some similarity to this case is that holding the decision to prosecute or not to prosecute falls within the discretionary function. *Smith v. United States,* 375 F. 2d 243, 247 (5th Cir.), *cert. denied,* 389 U. S. 841 (1967); *Brooks v. United States,* 152 F. Supp. 535, 537 (S. D. N. Y. 1957). The same is true of a decision when to institute and prosecute condemnation proceedings. *Goddard v. District of Columbia Redevelopment Land Agency,* 287 F. 2d 343, 345 (D. C. Cir.), *cert. denied,* 366 U. S. 910 (1961). The decision to abruptly close garbage

dumps at Yellowstone National Park in connection with the management of grizzly bears within the park was held to entail the type of judgment exempted by the discretionary function provision, notwithstanding the claim that the decision resulted in the death of a camper. *Martin v. United States,* 546 F. 2d 1355, 1360 (9th Cir. 1976), *cert. denied,* 432 U. S. 906 (1977). Issuance of a cease and desist order by the F. D. I. C. if it believes the bank is engaging in unsound practices is a determination left to the discretion of the agency. *Davis v. Federal Deposit Insurance Corporation,* 369 F. Supp. 277, 280 (D. Colo. 1974). In a case with facts somewhat parallel to the one under consideration, the court held a coal mine owner could not bring a Federal Tort Claims Act case claiming damages as a result of an administrative decision not to operate a coal

[9]

mine seized by the Government under executive authority in furtherance of the war effort. *Old King Coal Co. v. United States,* 88 F. Supp. 124, 125 (S. D. Iowa 1949).

Bernitsky seeks to distinguish the discretionary function situation by bringing itself within the line of authority which appears to authorize a Federal Tort Claims Act claim for negligent inspection by government agents who fail to uncover dangerous conditions ultimately causing harm to third persons. *Blessing v. United States,* 447 F. Supp. 1160 (E. D. Pa. 1978); *Toppi v. United States,* 327 F. Supp. 1277 (E. D. Pa. 1971). It also relies on cases under Pennsylvania law permitting a similar cause of action against private parties for negligent inspection. *Knight v. Otis Elevator Co.,* 596 F. 2d 84 (3d Cir. 1979); *Evans v. Otis Elevator Co.,* 403 Pa. 13, 168 A. 2d 573 (1961).

Those cases are inapplicable in this situation. Even though Bernitsky has sought to cast its claim in terms of negligence, a review of the material filed in connection with the Motion to Dismiss, or in the Alternative for Summary Judgment, establishes that plaintiff claims neither that there was any negligent inspection nor that there was negligence premised upon the failure to inspect.[3] On the contrary, the inspection accurately disclosed that there was a nonconforming facility. Once that was evident, the inspector issued the notice of violation, within his statutory authority, 30 U. S. C. § 814(b) (1976), and, when the violation remained uncorrected

[10]

after seven months and three extensions of time, the order was issued closing the mine. In essence, Bernitsky complains not of any negligent action but of regulatory enforcement action, *i.e.* that the mine was closed, which Bernitsky argues was not reasonable under the circumstances. It is precisely that kind of judgment which the discretionary function exception encompasses.

In *Griffin v. United States,* 500 F. 2d 1059 (3d Cir. 1974), this court had occasion to consider the purpose of the discretionary function exception. There we empha-

3. The only factual issues which Bernitsky raises in its unverified Answer to the Motion to Dismiss or Motion for Summary Judgment are the failure of the MESA inspector to inform it of the proper method of obtaining approval of the toilet facility, the failure to inform it as to which facilities were approved, and the fact that the February 13, 1974 Withdrawal Order was later abated. Even were these facts properly presented in opposing affidavits, they fail to alter the nature of the administrative decision which allegedly caused the damage, i.e. the Withdrawal Order.

sized it was aimed at protecting decisions involving "policy judgments as to the public interest." *Id.* at 1064. We stated that "[t]o determine the applicability of the discretionary function exception . . . we must analyze not merely whether judgment was exercised but also whether the nature of the judgment called for policy considerations." *Id.* In an earlier case, the panel had succinctly expressed the distinction by noting that "ordering an army maneuver is a discretionary function, but the negligent operation of an army vehicle during such a maneuver is not." *Ward v. United States,* 471 F. 2d 667, 670 (3d Cir. 1973).

Therefore, our inquiry must be directed to the nature of the judgment which must be made in the decision whether to issue a Withdrawal Order closing a noncomplying coal mine. The Coal Mine Health and Safety Act of 1969, 30 U. S. C. § 801, *et seq.* (1976), was enacted as part of the continuing federal regulation of mine health and safety in coal. The Secretary of the Interior is required to designate mandatory health and safety standards following consultation and public hearing. 30 U. S. C. § 811. Among the standards which have been promulgated is that requiring each operator of a coal mine to maintain an approved sanitary toilet. The relevant regulation provides:

> (a) Except as provided in § 75.1712-7, each operator of an underground coal mine shall, on and
>
> [11]
>
> after December 30, 1970, provide and maintain one approved sanitary toilet, together with an adequate supply of toilet tissue, in a dry location under protected roof, within 500 feet of each working place in

the mine where miners are regularly employed during the mining cycle. A single approved sanitary toilet may serve two or more working places in the same mine, if it is located within 500 feet of each such working place.

(b) Only sanitary toilets approved by the Health Division, Coal Mine Health and Safety, Bureau of Mines shall meet the requirements of this section.

(c) Applications for approval of sanitary toilets shall be submitted to:

Health Division, Coal Mine Health and Safety, Bureau of Mines, U. S. Department of the Interior, Washington, D. C. 20240.

30 C. F. R. § 75.1712-6 (1973).

The statute authorizes the Secretary to investigate and inspect mines subject to his jurisdiction for the purpose of determining whether the mine operator is complying with the mandatory health and safety standards which have been promulgated. 30 U. S. C. § 813(a)(4) (1976). These investigations are conducted by MESA inspectors. The MESA inspector who conducts the investigations and determines that a mine operator has failed to comply with the standards can issue either a withdrawal and debarment order closing the mine, or, if deemed appropriate, a notice of violation for lesser violations.

If an inspector determines, on inspection of a coal mine, that an "imminent danger exists", an order shall be issued withdrawing all but certain specified persons from the area until the inspector "determines that such imminent danger no longer exists." *Id.* § 814(a). On the other hand, when the inspector determines that the vio-

lation has not created an "imminent danger", "he shall issue a notice to the operator or his agent fixing a reasonable time for the abatement of the violation," which can be extended by the inspector, until s/he makes a determination "that the period of time should not be further extended." *Id.* § 814(b).[4] The judgmental nature of the

4. The statute provides:

(a) If, upon any inspection of a coal mine, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the area throughout which such danger exists, and thereupon shall issue forthwith an order requiring the operator of the mine or his agent to cause immediately all persons, except those referred to in subsection (d) of this section, to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger no longer exists.

(b) Except as provided in subsection (i) of this section, if, upon any inspection of a coal mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard but the violation has not created an imminent danger, he shall issue a notice to the operator or his agent fixing a reasonable time for the abatement of the violation. If, upon the expiration of the period of time as originally fixed or subsequently extended, an authorized representative of the Secretary finds that the violation has not been totally abated, and if he also finds that the period of time should not be further extended, he shall find the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to cause immediately all persons, except those referred to in subsection (d) of this section, to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that the violation has been abated.

30 U. S. C. § 814(a) and (b) (1976).

inspector's determination whether to extend further the period of time for abatement of the violation is evidenced by two decisions of the Interior Board of Mine Operations Appeals. In *Old Ben Coal Company,* 6 IBMA 294, 306 (1976), the Board enunciated its test concerning the

[13]

validity of a section 104(b) [30, U. S. C. § 814(b)] order when it held that the inspector's determination to issue a section 104(b) order must be based on "the *facts* confronting the inspector at the time he issued the subject withdrawal order regarding whether an *additional* abatement period should be allowed." (emphasis in original). The Board framed the issue as "whether the inspector abused his enforcement discretion by issuing a withdrawal order instead of further extending the time for abatement", *id.*, and held that he did. Subsequently, in *United States Steel Corporation,* 7 IBMA 109, 114 (1976), the Board affirmed the Administrative Law Judge's conclusion "as a matter of law, that the inspector's authority under section 104(b) of the Act in determining whether the time allowed for abatement should be extended or an order of withdrawal issued carries the implication *that it will be exercised reasonably, not arbitrarily or capriciously.*" (emphasis added).

The record in this case discloses that the Mining Enforcement and Safety Administration sent representatives to meetings of inspectors at various district offices to call the inspectors' attention to the factors they should consider in exercising their discretion whether to issue notices and grant extensions. A speech, prepared by the Chief of Safety of MESA, and delivered on his behalf by Frank Henderson, a Coal Mine Specialist, at a district

meeting attended by Inspector Updegrave, the inspector who issued the Withdrawal Order in this case, stressed the need for determination of what is a "reasonable time" for the abatement period, and whether "due diligence has been exercised in an attempt to gain compliance" before extensions are granted. It is apparent from the foregoing that the decisions regarding issuance of a notice of violation, extensions of time, and orders of withdrawal must be made by the individual inspectors on the basis of their experience and judgment, and therefore fall within the scope of the discretionary function exception. They are "matters involving balancing of

[14]

policy considerations in advancing the public interest." *Griffin v. United States,* 500 F. 2d 1059, 1064 (3d Cir. 1974). Decision making as to investigation and enforcement, particularly when there are different types of enforcement action available, are discretionary judgments. *In re Air Crash Disaster Near Silver Plume, Colorado,* 445 F. Supp. 384, 401-04 (D. Kan. 1977); *see First National Bank in Albuquerque v. United States,* 552 F. 2d 370, 375-76 (10th Cir.), *cert. denied,* 434 U. S. 835 (1977). Thus, in making the determination of the course to follow, the MESA inspector must use his or her judgment as to the manner in which the statutory authority can best be effectuated, an act which cannot subject the government to tort liability.

In *Weinstein v. United States,* 244 F. 2d 68 (3d Cir.), *cert. denied,* 355 U. S. 868 (1957), plaintiff's suit against the government charged that the enforcement by revenue agents of regulations regarding prohibited hours of operation of an alcohol denaturing plant and bonded warehouse

led to an explosion and fire causing death and injury. This court held that a charge based on the locking of the building which was in accordance with regulations promulgating under statutory authority must be dismissed because it fell within the discretionary function exception of the Tort Claims Act. The recent decision in *Griffin v. United States, supra,* on which appellant relies is not applicable to the type of decision making involved here. In *Griffin,* the government had undertaken to test and thereafter approved for release live virus polio vaccine that failed to meet the scientific standards set forth in the regulations. 500 F. 2d at 1063-69. There is no analogy between the negligent failure to comply with regulations at issue there and the regulatory enforcement activity at issue here.

Additionally, we believe that it is significant that the Coal Mine Health and Safety Act itself provides the mechanism whereby notices of violation and withdrawal

[15]

orders may be reviewed and that Bernitsky never availed itself of the opportunity to challenge the various notices of violation or the withdrawal order through the administrative route available. Under section 105(a)(1) of the statute, 30 U. S. C. § 815(a)(1) (1976), as it existed before amendment in 1977,[5] Bernitsky had the right to apply to

5. Administrative changes were effected by the Amendment to the statute contained in the Federal Mine Safety and Health Amendments Act of 1977, Pub. L. 95-164, Nov. 9, 1977, 91 Stat. 1290, 30 U. S. C. §§ 801 *et seq.* (Supp. I 1977). The Act modified the FCMHSA to make it the single mine safety and health act, created an independent agency, the Federal Mine Safety and Health Review Commission, 30 U. S. C. § 823 (Supp. I 1977), which took over the functions of the Interior Board of Mine Operations Appeals, and transferred most of the other duties of

the Secretary of the Interior or his delegate for review of the notice of violation and the order entered against it within thirty days of receipt of the order. Under regulations in effect in 1974, the Secretary's authority pertaining to application for review of the notices of violation and withdrawal orders was delegated to the Board of Mine Operations Appeals. 43 C. F. R. § 4.500(a)(1) (1973). Thereafter, the Secretary or his delegate would have been required to conduct an investigation, including a public hearing if requested, and issue a written decision, incorporating therein an order vacating, affirming or terminating the order. 30 U. S. C. § 815(b) (1976). The order would then have been subject to review in the Court of Appeals. 30 U. S. C. § 816(a) (1976). The Withdrawal Order in this case could have been issued only after a prior Notice of Violation. Had Bernitsky availed itself of the opportunity of challenging the Notice of Vio-

[16]

lation, which it had ample time to do, it might have been able to avoid the sequence of events which followed.

The administrative review procedure is the safeguard provided by Congress against arbitrary action or abuse of discretion by administrators in carrying out their responsibilities under federal statutes. The appropriate action by Bernitsky would have been an appeal using the applicable administrative procedure. It is instructive to compare, in

5. (Cont'd.)
the Secretary of the Interior to the Secretary of Labor. The mine operators continue to have the right to seek review of notices and orders within thirty days of receipt of notification, 30 U. S. C. § 815(a) (Supp. I 1977) and they have the right to a hearing before the Commission, 30 U. S. C. § 815(d) (Supp. I 1977).

this regard, the procedure used in *Golden Holiday Tours v. CAB,* 531 F. 2d 624 (D. C. Cir. 1976), where an inclusive tour operator petitioned for review of the rejection by the CAB of an amendment to its prospectus which would have made available additional seats on certain transatlantic flights. In its review, the court noted that there was no request for damages, stating "It seems clear that damages would be barred under the discretionary activities exception to the Federal Torts Claims Act." *Id.* at 626, n. 6.

We need not decide whether in every case the fact that the decision which is the basis of the claim could have been reviewed administratively indicates the decision is the type that is encompassed within the discretionary function exception nor whether the availability of administrative review is incompatible with tort liability under the Federal Tort Claims Act. Nor do we hold that the exception precludes review in every situation involving regulatory agencies or decisions. We merely hold that the specific enforcement activities in this case fall within the ambit of 28 U. S. C. § 2680(a).

The procedural posture of this case merits some comment. The district court granted the Government's motion to dismiss treating the issue raised as one of law. In this case the affidavits and accompanying material submitted in connection with the Government's Alternative Motion for Summary Judgment shed light on the propriety of a dismissal because of the discretionary function exception. Our review of the record shows that

[17]

we have the factual basis upon which to make the determination relating to the application of the discretionary

function provision. Since Bernitsky had a reasonable opportunity to present opposing affidavits and other evidence, and failed to show that there was any disputed issue of fact as to a material issue, a grant of summary judgment would have been appropriate. See note 3 *supra*. Therefore, we see no reason to remand the case to the district court for disposition, and for the sake of judicial economy we will affirm the dismissal on the basis of the discretionary function exception. *See Sprague v. Fitzpatrick*, 546 F. 2d 560, 563 n. 4 (3d Cir. 1976), *cert. denied*, 431 U. S. 937 (1977).

Accordingly, we will affirm the judgment of the district court.

APPENDIX C.

OPINION OF THE U. S. DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Joseph BERNITSKY, Albert Bernitsky, Vincent Bernitsky and George Stenulis

v.

UNITED STATES of America.

Civ. A. No. 76-841.

United States District Court, E. D. Pennsylvania.

Jan. 11, 1979.

Thomas Rutter, Mitchell S. Pinsly, Philadelphia, Pa., for plaintiffs.

Bruce A. Menk and James P. Klapps, U. S. Dept. of Justice, Civil Division, Washington, D. C., for defendant.

MEMORANDUM AND ORDER

TROUTMAN, District Judge.

Plaintiffs are the owners and operators of a small independent coal mine located in Schuylkill County, Pennsylvania. They seek damages under the Federal Tort Claims Act (FTCA), alleging that defendant, through its duly authorized agents, representatives, servants and employees, did close plaintiffs' mine on February 13, 1974, and that in or about April of that year, as a proximate cause of said closure, plaintiffs' mine collapsed, destroying mining tools and equipment and rendering impossible the extraction of 112,000 tons of coal.

The Government moves to dismiss and/or for summary judgment, alleging, *inter alia,* that this action cannot

be maintained because there exists no actionable tort duty upon which the liability of the United States can be predicated.

Regarding this contention, it is well settled that the FTCA does not itself give rise to a cause of action. It is merely a limited waiver of immunity with reference to ascertainable tort claims.

The statute, 28 U. S. C. § 1346(b), reads, in pertinent part:

> "* * * (T)he District Courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages * * * for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

See also *Dalehite v. United States*, 346 U. S. 15, 73 S. Ct. 956, 97 L. Ed. 1427 (1952). The FTCA is a limited waiver of sovereign immunity, making the Federal Government liable to the same extent as a private party for certain torts of federal employees acting within the scope of their employment. *United States v. Orleans*, 425 U. S. 807, 96 S. Ct. 1971, 48 L. Ed. 2d 390 (1976). The act only confers a procedural remedy, and does not create a substantive cause of action. *Dalehite v. United States, supra, Certain Underwriters at Lloyd's v. United States*, 511 F. 2d 159 (5th Cir. 1975).

Therefore, the Government can only be liable to plaintiffs in this case if a private individual would be liable

in Pennsylvania under these circumstances. Thus, there must have been a breach of a duty, which duty must have been prescribed either by statute or by the common law.

Although the Government employees in question were acting pursuant to the Coal Mine Health and Safety Act of 1969, 30 U. S. C. § 801 *et seq.*, there is no indication that said Act was intended to create a private cause of action against the United States. The purpose of the Act is to protect the health and safety of miners, and to that end the Act provides for standards for safety and health, and enforcement procedures to ensure that such standards are met. Mine operators have remedies, including both administrative and judicial review, if they feel certain conduct by enforcement officials was improper at any point, but there is simply nothing in the Act indicating that a cause of action has been created on behalf of mine operators against the United States as a result of alleged misconduct by officials in conducting inspections or otherwise enforcing the provisions of the Act. Accordingly, we hold that the Coal Mine and Safety Act of 1969 does not create an independent cause of action in this case.

Additionally, there is nothing in the law of Pennsylvania indicating that a cause of action exists on behalf of coal mine operators for improper closure of coal mines under the provisions of the Coal Mine Health and Safety Act of 1969. See *Devlin Lumber and Supply Corp. v. United States,* 488 F. 2d 88 (4th Cir. 1973), *Davis v. United States,* 395 F. Supp. 793 (D. Neb. 1975), *affirmed per curiam,* 536 F. 2d 758 (8th Cir. 1976). In *Blessing v. United States,* 447 F. Supp. 1160 (E. D. Pa. 1978), Judge Becker held that under certain circumstances the United States could be liable to injured employees for an alleged improper inspection by Occupational Safety and Health Act inspectors, but grounded such considerations

upon a finding that Pennsylvania recognizes the "good Samaritan" rule in which one who undertakes to render service for another is liable for negligent rendering of said services if the negligence causes injury. There is no equivalent Pennsylvania rule on which liability of the United States to coal mine operators can be grounded for damages allegedly resulting from improper closure or other enforcement activity under the Coal Mine Health and Safety Act of 1969.

Similarly, the common law does not recognize a cause of action under these circumstances. Federal case law has repeatedly held that federal inspection does not create a tort duty. See *Kirk v. United States,* 161 F. Supp. 722 (D. Idaho 1958), *affirmed,* 270 F. 2d 110 (9th Cir. 1959); *Fisher v. United States,* 441 F. 2d 1288, 1292 (3d Cir. 1971), and cases cited therein; *Chaneyfield v. City of New York, et al.,* 525 F. 2d 1333 (2d Cir. 1975); *Zabala Clemente v. United States,* 567 F. 2d 1140 (1st Cir. 1977); *Social Security Administration Baltimore Federal Credit Union v. United States,* 138 F. Supp. 639 (D. Md. 1956); *Davis v. FDIC,* 369 F. Supp. 277 (D. Colo. 1974); *In re Franklin National Bank Securities Litigation,* 445 F. Supp. 723 (E. D. N. Y. 1978).

Futhermore, there is no Pennsylvania case law suggesting liability under these circumstances, and one case actually held that a governmental authority (a municipality) acting in its general capacity for the protection of the general public cannot be held liable for a mere failure to furnish adequate police protection to a particular individual to whom no special duty was owed. See *Romisher v. SEPTA,* 65 Pa. D. & C. 2d 483 (1974).

In conclusion, this Cout can find no basis for tort liability to be imposed against the United States for al-

leged improper closure pursuant to the Coal Mine Health and Safety Act of 1969. Accordingly, defendant's motion to dismiss will be granted. Therefore, we need not reach other contentions advanced by the Government in support of its motion for summary judgment.